No. 17-333

IN THE

Supreme Court of the United States

O. JOHN BENISEK, ET AL.,

Appellants,

v.

LINDA H. LAMONE, ADMINISTRATOR, MARYLAND STATE BOARD OF ELECTIONS, ET AL.,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

BRIEF OF THE FREEDOM PARTNERS CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

DOUGLAS R. COX
Counsel of Record
AMIR C. TAYRANI
DAVID W. CASAZZA
BRIAN M. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
dcox@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. POLITICAL GERRYMANDERING DOES NOT IMPLICATE FIRST AMENDMENT RIGHTS 3

A. This Court's Patronage Cases Do Not Apply To Political Gerrymandering 4

B. No Other First Amendment Right Is Implicated By Political Gerrymandering 7

II. A CLAIM OF POLITICAL GERRYMANDERING IS NOT JUSTICIABLE 11

A. The Constitution Gives Congress, Not The Courts, The Authority To Regulate Gerrymandering 12

B. There Is No Manageable Standard For First Amendment Gerrymandering Claims 17

1. This Court Has Never Articulated An Administrable Standard For Political Gerrymandering Claims 17

2. Neither The Lower Court Nor The Appellants Offer An Administrable Standard 22

C. Repeated Redistricting Litigation Damages The Political Process And The Courts 30

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. *Perez*,
No. 17-586, 2018 WL 386558
(U.S. Jan. 12, 2018) 33

Agre v. *Wolf*,
No. 17-cv-4392, 2018 WL 351603
(E.D. Pa. Jan. 10, 2018) 22

Ala. Legislative Black Caucus v.
Alabama,
231 F. Supp. 3d 1026
(M.D. Ala. 2017) 31, 33

Ala. Legislative Black Caucus v.
Alabama,
988 F. Supp. 2d 1285
(M.D. Ala. 2013) 22

Anderson v. *Celebrezze*,
460 U.S. 780 (1983) 7

Ariz. State Legislature v. *Ariz. Indep.*
Redistricting Comm'n,
135 S. Ct. 2652 (2015) 13, 14, 15, 31

Badham v. *March Fong Eu*,
694 F. Supp. 664 (N.D. Cal. 1988) 4, 11

Baker v. *Carr*,
369 U.S. 186 (1962) 12

Bd. of Cty. Comm'rs v. *Umbehr*,
518 U.S. 668 (1996) 4

Branti v. *Finkel*,
445 U.S. 507 (1980) 6

Burdick v. *Takushi*,
504 U.S. 428 (1992) 7

Burns v. *Richardson*,
384 U.S. 73 (1966) 18

Cal. Democratic Party v. *Jones*,
530 U.S. 567 (2000) 9, 10

Colegrove v. *Green*,
328 U.S. 549 (1946) 14

Comm. for a Fair & Balanced Map v.
Ill. State Bd. of Elections,
835 F. Supp. 2d 563 (N.D. Ill. 2011) 4, 10

Cooper v. *Harris*,
137 S. Ct. 1455 (2017) 2, 6

Crawford v. *Marion Cty. Election Bd.*,
553 U.S. 181 (2008) 7, 8

Davis v. *Bandemer*,
478 U.S. 109 (1986) 8, 9, 14, 18, 19, 26, 33

Elrod v. *Burns*,
427 U.S. 347 (1976) 4

Ferrell v. *Hall*,
406 U.S. 939 (1972) 18

Ferrell v. *Hall*,
339 F. Supp. 73 (W.D. Okla. 1972) 18

Fortson v. *Dorsey*,
379 U.S. 433 (1965) 18

Gaffney v. *Cummings*,
412 U.S. 735 (1973) 18

Hollingsworth v. *Perry*,
133 S. Ct. 2652 (2013) 11

Holloway v. *Hechler*,
817 F. Supp. 617 (S.D.W. Va. 1992) 4

Initiative & Referendum Inst. v. *Walker*,
450 F.3d 1082 (10th Cir. 2006) 9

Japan Whaling Ass'n v. *Am. Cetacean Soc'y*,
478 U.S. 221 (1986) 12

Jimenez v. *Hidalgo Cty. Water Improvement Dist. No. 2*,
424 U.S. 950 (1976) 17

Jimenez v. *Hidalgo Cty. Water Improvement Dist. No. 2*,
68 F.R.D. 668 (S.D. Tex. 1975) 17

Kerr v. *Hickenlooper*,
759 F.3d 1186 (10th Cir. 2014) 34

Kidd v. *Cox*,
No. 1:06-CV-997, 2006 WL 1341302
(N.D. Ga. May 16, 2006) 4, 5, 8, 10

League of United Latin Am. Citizens v. *Perry*,
548 U.S. 399 (2006) 15, 16, 21, 29

League of Women Voters v. *Quinn*,
No. 1:11-cv-5569, 2011 WL 5143044
(N.D. Ill. Oct. 28, 2011) 4, 9, 10

League of Women Voters of Fla. v. *Detzner*,
172 So. 3d 363 (Fla. 2015) 32

League of Women Voters of Pa. v. *Commonwealth*,
175 A.3d 282 (Pa. 2018) 32

McLaughlin v. *Florida*,
379 U.S. 184 (1964) 16

McPherson v. *Blacker*,
146 U.S. 1 (1892) 8

Miller v. *Johnson*,
515 U.S. 900 (1995) 16

Nixon v. *United States*,
506 U.S. 224 (1993) 12, 13, 17

O'Lear v. *Miller*,
222 F. Supp. 2d 850
(E.D. Mich. 2002) 4, 10

Pac. States Tel. & Tel. Co. v. *Oregon*,
223 U.S. 118 (1912) 14

Perez v. *Texas*,
No. 11-CA-360, 2011 WL 9160142
(W.D. Tex. Sept. 2, 2011) 22

Pope v. *Blue*,
809 F. Supp. 392 (4th Cir. 1992) 3

Radogno v. *Ill. State Bd. of Elections*,
No. 1:11-cv-4884, 2011 WL 5868225
(N.D. Ill. Nov. 22, 2011) 22

Radogno v. *Ill. State Bd. of Elections*,
No. 1:11-cv-4884, 2011 WL 5025251
(N.D. Ill. Oct. 21, 2011) 4, 10, 21, 32

Raleigh Wake Citizens Ass'n v. *Wake Cty. Bd. of Elections*,
827 F.3d 333 (4th Cir. 2016) 21

Raleigh Wake Citizens Ass'n v. *Wake Cty. Bd. of Elections*,
166 F. Supp. 3d 553 (E.D.N.C. 2016) 21

Republican Party of N.C. v. *Martin*,
980 F.2d 943 (4th Cir. 1992) 3

Schlesinger v. *Reservists Comm. to Stop the War*,
418 U.S. 208 (1974) 17

Vieth v. *Jubelirer*,
541 U.S. 267 (2004) 5, 6, 9, 19, 20, 21, 30

Vieth v. *Jubelirer*,
539 U.S. 957 (2003) 20

Vieth v. *Pennsylvania*,
188 F. Supp. 2d 532 (M.D. Pa. 2002).....4, 20

Washington v. *Finlay*,
664 F.2d 913 (4th Cir. 1981).....3, 8, 10

Wells v. *Rockefeller*,
398 U.S. 901 (1970).....18

Wells v. *Rockefeller*,
311 F. Supp. 48 (S.D.N.Y. 1970).....18

Whitcomb v. *Chavis*,
403 U.S. 124 (1971).....18

Whitford v. *Gill*,
218 F. Supp. 3d 837
(W.D. Wis. 2016) 33

WMCA, Inc. v. *Lomenzo*,
382 U.S. 4 (1965).....17

WMCA, Inc. v. *Lomenzo*,
238 F. Supp. 916 (S.D.N.Y. 1965).....17

Zivotofsky v. *Clinton*,
566 U.S. 189 (2012).....12

Federal Constitutional Provisions

U.S. Const. art. I, § 2.....8, 13

U.S. Const. art. I, § 3.....13

U.S. Const. art. I, § 4.....11, 12, 13, 32

U.S. Const. art. I, § 5.....13

U.S. Const. art. II, § 1 13

U.S. Const. art. III, § 2 11

U.S. Const. art. IV, § 4 13

U.S. Const. amend. XIV 16

U.S. Const. amend. XV 16

U.S. Const. amend. XXV 13

State Constitutional Provisions

Alaska Const. art. VI, § 8 32

Cal. Const. art. XXI, §§ 1–3 32

Wash. Const. art. II, § 43 32

Statutes

2 U.S.C. § 2c 15, 32

52 U.S.C. § 10301 16

Act of Aug. 8, 1911,
37 Stat. 13 15

Act of Feb. 2, 1872,
17 Stat. 28 15

Act of Feb. 7, 1891,
26 Stat. 735 15

Act of Feb. 25, 1882,
22 Stat. 5 15

Act of Jan. 16, 1901,
31 Stat. 733 15

Act of June 25, 1842,
5 Stat. 491 14

Electoral Count Act of 1877,
24 Stat. 373 14

Idaho Code Ann. §§ 72-1501 *et seq.* 32

Voting Rights Act of 1965,
79 Stat. 437 16

Proposed Legislation

H.R. 145,
115th Cong., 1st Sess. (2017) 32

H.R. 151,
115th Cong., 1st Sess. (2017) 32

H.R. 711,
115th Cong., 1st Sess. (2017) 32

H.R. 712,
115th Cong., 1st Sess. (2017) 32

H.R. 713,
115th Cong., 1st Sess. (2017) 32

H.R. 1102,
115th Cong., 1st Sess. (2017) 32

H.R. 3057,
115th Cong., 1st Sess. (2017) 32

H.R. 3537,
115th Cong., 1st Sess. (2017).....32

H.R. 3848,
115th Cong., 1st Sess. (2017).....32

S. 1880,
115th Cong., 1st Sess. (2017).....32

Other Authorities

Jacob Eisler,
Partisan Gerrymandering and the Illusion of Unfairness, 67 Cath. U.L. Rev. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993876 31

Patrick Marley,
Democrats Grab Key Wisconsin Senate Seat in Tuesday's Special Elections, *Milwaukee Journal Sentinel* (last updated Jan. 17, 2018), https://www.jsonline.com/story/news/2018/01/16/wisconsin-voters-chose-legislators-tuesdays-special-elections/1038687001 31

Md. State Bd. of Elections,
Voter Registration Statistics, http://www.elections.state.md.us/voter_registration/stats.html.....27

Peter H. Schuck,
The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325 (1987) 19

David Wasserman & Ally Flinn,
Introducing the 2017 Cook Political Report Partisan Voter Index, The Cook Political Report (Apr. 7, 2017), https://www.cookpolitical.com/index.php/introducing-2017-cook-political-report-partisan-voter-index 24

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Freedom Partners Chamber of Commerce is a non-profit, non-partisan organization whose members support free enterprise, fiscal responsibility, and fair markets. *Amicus* values genuine accountability and seeks to ensure that government at every level—federal, state, and local—is responsive to the interests of the American people. *Amicus* advances this mission by working to educate the public about the real benefits of freedom, opportunity, and hard work, by partnering with government officials to promote free enterprise and fair opportunities for all, and by holding public officials accountable for harmful actions. *Amicus* and its members are dedicated to preserving the integrity of the electoral process and the limits imposed by the Constitution on the judicial power.

SUMMARY OF ARGUMENT

Appellants ask this Court to do what it has never done before—hold that political gerrymandering violates the First Amendment. Their request is all the more bold because they breeze past the question of what specific First Amendment right is at issue. But examining the constitutional underpinnings of their claim exposes the flaws in their theory.

The political patronage decisions on which Appellants rely are demonstrably inapplicable in the

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no one other than *amicus curiae* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, Appellants and Appellees have entered consent on the docket to the filing of *amicus curiae* briefs.

partisan-gerrymandering setting. As several lower courts have noted, the harms of patronage are external to the political process, while the alleged harm from gerrymandering is internal to the political process. This difference makes the test from the patronage cases inapposite to gerrymandering claims because it would require the courts to prohibit any partisanship in redistricting, a result at odds with both common sense and this Court's repeated pronouncements that "partisan advantage" is a permissible redistricting factor. *Cooper* v. *Harris*, 137 S. Ct. 1455, 1464 (2017).

The district court and Appellants' *amici* also offer a slew of arguments to extend other doctrines to encompass claims of political gerrymandering. But political gerrymandering is not unconstitutional under any of them, including the ballot-access cases, a right to representation, the right to association, or the freedom of expression and belief. The very disagreement among the briefs supporting Appellants underscores that Appellants seek not to vindicate an existing right under the First Amendment but to shoehorn a new right—unmoored from text, history, or precedent—into existing First Amendment jurisprudence.

Appellants' struggle to identify a First Amendment right implicated by partisan redistricting is understandable. This is an area in which the Constitution simply gives courts no role. The Constitution purposefully and specifically gives control over congressional districting to the state legislatures while reserving a supervisory power to Congress. Because the Constitution commits this role to a coordinate branch of government, it leaves no

room for the judiciary to police the role of partisanship in the redistricting process.

Moreover, even if the Constitution did preserve a role for courts to try to decide partisan redistricting cases, the lack of a manageable standard would make the task impossible. For more than fifty years, this Court and every lower court to attempt the task have been unable to define a test that can consistently distinguish between permissible and impermissible district maps.

Lower courts have almost uniformly rejected claims of political gerrymandering because the plaintiffs failed to define the specific constitutional right underlying their claims or to articulate a manageable judicial standard. The Court should likewise conclude that the practice of political gerrymandering—even if unpopular or unsavory—does not violate the First Amendment. Alternatively, without any means of adjudicating these cases, the Court should hold claims of partisan gerrymandering to be nonjusticiable.

ARGUMENT

I. POLITICAL GERRYMANDERING DOES NOT IMPLICATE FIRST AMENDMENT RIGHTS.

For more than 30 years and in multiple jurisdictions, plaintiffs have been arguing in the lower courts that political gerrymandering violates the First Amendment, and almost every court presented with such a claim has rejected it.[2] Neither the theory

---

[2] *See Republican Party of N.C.* v. *Martin*, 980 F.2d 943, 959–61 (4th Cir. 1992); *Pope* v. *Blue*, 809 F. Supp. 392, 398–99 (4th Cir. 1992); *Washington* v. *Finlay*, 664 F.2d 913, 927–28 (4th Cir.

advanced by Appellants—that political gerrymandering represents unconstitutional retaliation for the exercise of their First Amendment rights—nor any other theory advanced over the years implicates a right protected by the First Amendment. Simply put, Appellants "are not prevented from fielding candidates[,] from voting for the candidate of their choice," or from doing anything else protected by the First Amendment. *Badham*, 694 F. Supp. at 674.

A. This Court's Patronage Cases Do Not Apply To Political Gerrymandering.

Appellants contend that political gerrymandering constitutes unconstitutional retaliation against them for engaging in activity protected by the First Amendment. In support of that claim, they rely on this Court's political patronage cases, which involve harms such as termination from a government job or nonrenewal of a public contract. *See, e.g.*, *Bd. of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996) (contract); *Elrod* v. *Burns*, 427 U.S. 347 (1976) (employment). But political gerrymandering lies beyond the scope of these cases because the state action at issue is materially different.

1981); *Comm. for a Fair & Balanced Map* v. *Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011); *League of Women Voters* v. *Quinn*, No. 1:11-cv-5569, 2011 WL 5143044, at *1 (N.D. Ill. Oct. 28, 2011); *Radogno* v. *Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 WL 5025251, at *6–8 (N.D. Ill. Oct. 21, 2011) (*Radogno I*); *Kidd* v. *Cox*, No. 1:06-CV-997, 2006 WL 1341302, at *15–19 (N.D. Ga. May 16, 2006); *O'Lear* v. *Miller*, 222 F. Supp. 2d 850, 860 (E.D. Mich. 2002); *Vieth* v. *Pennsylvania*, 188 F. Supp. 2d 532, 548 (M.D. Pa. 2002); *Holloway* v. *Hechler*, 817 F. Supp. 617, 628–29 (S.D.W. Va. 1992); *Badham* v. *March Fong Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988).

The harms addressed in this Court's political patronage cases are highly distinct from the harms alleged by Appellants here. As one lower court has explained, "[t]he direct injuries occasioned in political patronage cases are outside the electoral process but impact the electoral process by conditioning employment on political belief and association." *Kidd*, 2006 WL 1341302, at *18. Gerrymanders are different. As the same court explained, "[t]he purpose and effect of a political gerrymander . . . is to manipulate the electoral process directly, by altering the composition of electoral districts so a desired election result becomes more likely." *Id.* It is these kinds of harms that Appellants allege. *See, e.g.*, Appellants' Br. 28 ("dilut[ion]" of votes); *id.* at 41 ("'disadvantage' in the electoral process" (quoting J.S. App. 39a)). But these effects are internal to the electoral process and do not involve external, non-electoral injuries, such as the loss of employment or a public contract.

Applying a test designed for harms external to the electoral process to political gerrymandering would mean that legislatures could not take politics into account at all when redistricting. The patronage cases flatly prohibit political considerations for most government jobs and contracts. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 294 (2004) (plurality op.). This prohibition is tenable in those contexts only because it is possible to separate politics from decisions about public employment and contracting. In gerrymandering cases, however, the motivation for the state action and the effect of the action both take place in the political sphere. Transplanting the patronage cases' outright prohibition on the consideration of politics to the gerrymandering setting would therefore require remov-

ing all political considerations from the inherently political task of redistricting—an absurd and impossible outcome.

Indeed, the exception in the patronage context for policy-level jobs underscores how unworkable it would be to apply First Amendment standards developed in the patronage setting to political gerrymandering. The Court has permitted the consideration of applicants' politics for policy-level jobs, but it has not attempted to devise a balancing test to determine how much partisanship should be permitted. *See, e.g.*, *Branti* v. *Finkel*, 445 U.S. 507, 518 (1980). Instead, the Court has created a bright-line test excluding these employment decisions from First Amendment scrutiny. The Court should adopt a similar rule for political gerrymandering because it is impossible to determine how much politics is too much in redistricting decisions.

Appellants conveniently argue that redistricting should take account of some political factors while eschewing consideration of voting history or partisan affiliation, but that effort fails. Just last year, the Court referred to "partisan advantage"—without any qualification—as a traditional redistricting criterion. *See Cooper*, 137 S. Ct. at 1464; *see also Vieth*, 541 U.S. at 285 (plurality op.) (politics as legitimate redistricting criterion); *id.* at 307 (Kennedy, J., concurring in the judgment) (same); *id.* at 344 (Souter, J., dissenting) (same); *id.* at 355 (Breyer, J., dissenting) (same). Voting history and partisan affiliation are the building blocks of political analysis, and the system without them that Appellants envision would leave little—if anything—more than avoiding incumbent conflicts and otherwise suiting incumbents' fancies as valid political considerations.

Cf. Appellants' Br. 47–48. That result is far less democratic than the current system. Partisanship at least involves the pursuit of ideological goals shared by large groups of voters; incumbent protection advances only the personal ambitions of elected officials. It cannot be that the First Amendment privileges incumbent protection over other partisan considerations.

B. No Other First Amendment Right Is Implicated By Political Gerrymandering.

Appellants rest their First Amendment claim solely on their flawed retaliation theory. Even if the Court were to take the extraordinary step of deciding this case on a theory other than the one advanced by Appellants, there is no other First Amendment right at issue. Appellants themselves disclaim that gerrymandering implicates the right of ballot access, and there is no representational, associational, or speech right in play either.

1. Appellants correctly acknowledge that this Court's ballot-access cases, including *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), are inapplicable to political gerrymandering. *See* Appellants' Br. 39 n.5. Those cases involve practices such as regulations of filing deadlines for independent candidates, *Anderson*, 460 U.S. at 782; prohibitions on write-in voting, *Burdick* v. *Takushi*, 504 U.S. 428, 430 (1992); and voter-ID laws, *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008). Unlike those practices, partisan gerrymandering does not prevent voters from casting their ballots or candidates from appearing on those ballots. Moreover, the test in the ballot-access cases "applies in lieu of strict scrutiny only to 'even-

handed' and 'nondiscriminatory' restrictions upon voters' First Amendment rights." Appellants Br. 39 n.5 (quoting *Crawford*, 553 U.S. at 189–90). Because partisan gerrymandering claims necessarily allege that the legislature acted with partiality, the ballot-access test is inapplicable. *Id.*

2. Nor has the Maryland General Assembly violated anyone's representational rights, whether under the First Amendment alone or in combination with the provisions of Article I, § 2.

There has been no outright denial of representation. *See McPherson* v. *Blacker*, 146 U.S. 1, 26 (1892) ("It has never been doubted that representatives in Congress [chosen by district] represented the entire people of the States acting in their sovereign capacity."). What Appellants actually seek is a right to *success* at the ballot box, in the form of remedying "an identifiable 'political disadvantage.'" Appellants' Br. 27. But "the Constitution does not guarantee political success." *Kidd*, 2006 WL 1341302, at *18. "The carefully guarded right to expression does not carry with it any right to be listened to, believed, or supported in one's views." *Washington*, 664 F.2d at 928.

Two principles articulated by this Court defeat any argument based on representational rights in this case. First, Appellants are not denied any representational rights by an imbalance in the number of representatives from each party compared to the total number of voters from that party. As early as *Davis* v. *Bandemer*, 478 U.S. 109 (1986), the Court "clearly foreclose[d] any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide

vote will be." *Id.* at 130 (plurality op.); *see also Vieth*, 541 U.S. at 288 (plurality op.) (the Constitution "nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers").

Second, "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Bandemer*, 478 U.S. at 132 (plurality op.). "This is true even in a safe district where the losing group loses election after election." *Id.*; *see also League of Women Voters*, 2011 WL 5143044, at *4 ("[T]he First Amendment . . . 'does not ensure that all points of view are equally likely to prevail.'" (quoting *Initiative & Referendum Inst.* v. *Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006)).

Appellants' *amici* would find a First Amendment injury in a certain degree of disproportionate representation and do not accept the idea that *all* voters are represented by their elected officials. This Court should reaffirm its earlier decisions and reject these far-reaching arguments.

3. Furthermore, no right of association is violated by political gerrymandering. Although "[r]epresentative democracy in any populous unit of government is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views," the Court has not prohibited *every* diminution in the ability of citizens to do so. *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). Far from it. The Court has limited its involvement in the political process to protecting

citizens' "ability to field candidates for office, participate in campaigns, vote for their preferred candidate, or otherwise associate with others for the advancement of common political beliefs." *Kidd*, 2006 WL 1341302, at *17. For example, in *California Democratic Party*, the Court held that a "blanket primary," in which voters chose a candidate for a party's nomination regardless of the voter's or candidate's party affiliation, was unconstitutional because it "adulterate[d]" the parties' "candidate-selection process" and ultimately "chang[ed] the parties' message." 530 U.S. at 582.

Mere difficulty in association, in contrast, does not implicate the First Amendment. Appellants are not prevented from associating, or even effectively prevented from associating. All they are denied is a guaranteed level of success for that association, and the Constitution protects no such right. *Washington*, 664 F.3d at 927–28; *Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d at 575; *Radogno I*, 2011 WL 5025251, at *7; *O'Lear*, 222 F. Supp. 2d at 860.

4. Finally, no right of speech, belief, or expression is implicated by political gerrymandering. The district lines "do[ ] not prevent any [Appellant] from engaging in any political speech, whether that be expressing a political view, endorsing and campaigning for a candidate, contributing to a candidate, or voting for a candidate." *League of Women Voters*, 2011 WL 5143044, at *4; *see also Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d at 575. Appellants "are every bit as free under the new plan to run for office, express their political views, endorse and campaign for their favorite candidate, vote, or otherwise influence the political process through their expression." *Kidd*, 2006 WL 1341302, at *17. And there is no chilling effect on

any speech. An impermissible chilling effect arises where "an overly broad statute regulat[es] speech," but Appellants have no argument that the redistricting map "regulates their speech or subjects them to any criminal or civil penalties for engaging in protected expression." *Badham*, 694 F. Supp. at 675.

* * *

Gerrymandering may be unseemly. It may be something that the people of a State choose to address with independent commissions or the time-honored tradition of voting out incumbents, whether in the legislature or governor's office. Or, in congressional redistricting, it may be something that Congress chooses to address through its power to regulate congressional elections under Article I, § 4. *See infra* Part II.A. The people might even enact a constitutional amendment to provide a right to redistricting free of all partisan considerations. But despite their best efforts, Appellants, their *amici*, and the many plaintiffs who have preceded them with these oft-rejected arguments have all failed to identify any existing First Amendment right to be free of partisan redistricting.

II. A Claim Of Political Gerrymandering Is Not Justiciable.

Even if Appellants could identify a First Amendment right implicated by partisanship in redistricting, they have not demonstrated that their claim presents a justiciable question. The federal courts have power only to decide a "case" or "controversy." U.S. Const. art. III, § 2; *see also Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2659 (2013). This power is not unlimited. It is constrained, in part, by the political question doctrine, which prohibits courts from intruding "where there is

'textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon* v. *United States*, 506 U.S. 224, 228 (1993) (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)).

This case involves a question that is committed to Congress by the Constitution and that federal courts lack a means of assessing. As a result, federal courts "lack[ ] the authority to decide the dispute," and the case should be dismissed. *Zivotofsky* v. *Clinton*, 566 U.S. 189, 195 (2012).

A. The Constitution Gives Congress, Not The Courts, The Authority To Regulate Gerrymandering.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Despite this restriction, Appellants would have the Court "formulate national policies" on redistricting in order to resolve the problem of gerrymandering. *Id.* But this problem is political, "not legal in nature," and "[t]he judiciary is particularly ill suited to make such decisions." *Id.* (internal quotation marks omitted).

The Constitution assigns state legislatures the task of regulating congressional elections. U.S. Const. art. I, § 4. But the Constitution does not give state legislatures complete autonomy in the exercise of this power. The Framers anticipated that States could ne-

glect or manipulate the districting and electoral processes for untoward ends. To address that possibility, the Constitution assigns Congress a supervisory role, namely the power to "at any time by Law make or alter" the regulations governing congressional elections. *Id.* "The dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules." *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015).

The Election Clause's assignment of control over elections to the political branches conforms with the numerous other provisions giving Congress power to restrain or superintend elected officials. *See* U.S. Const. art. I, § 2 ("The House of Representatives . . . shall have the sole Power of Impeachment"); *id.* § 3 ("The Senate shall have the sole Power to try all impeachments."); *id.* § 5 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . . ."); *id.* ("Each House may[,] . . . with the concurrence of two thirds, expel a Member."); *id.* art. II, § 1 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes . . . ."); *id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."); *id.* amend. XXV (empowering Congress to determine whether the President is capable of carrying out the duties of the office in case of a conflict between the President and the principal officers of the executive departments).

This Court has held that many of the structural powers bestowed on the elected branches are not subject to judicial oversight. *See, e.g.*, *Nixon*, 506 U.S. at 226 (propriety of impeachment trial in the Senate not

subject to judicial review); *Pac. States Tel. & Tel. Co.* v. *Oregon*, 223 U.S. 118, 133 (1912) (questions arising under the Guarantee Clause are "political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress"). And, even in times of deep political crisis, the processes provided by the Constitution have worked to preserve the democratic system established by the Constitution. *See, e.g.*, Electoral Count Act of 1877, 24 Stat. 373 § 2 (establishing a commission to allow Congress to resolve disputes regarding the legitimate electoral college vote from several States).

Like these other structural provisions, the Elections Clause makes clear that "redistricting is a legislative function," not a judicial one. *Ariz. State Legislature*, 135 S. Ct. at 2668; *see also Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment) ("I do not believe, and the Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed."). While Appellants would have the Court wade deep into this "political thicket," *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946), "the Framers of the Constitution envisioned quite a different scheme. They placed responsibility for correction of such flaws in the people, relying on them to influence their elected representatives." *Bandemer*, 478 U.S. at 144 (Burger, C.J., concurring in the judgment).

Congress has not shied away from exercising its supervisory authority. Congress first used that authority to require that congressional elections be conducted through single-member districts. Act of June 25, 1842, 5 Stat. 491. Following this first measure,

Congress has frequently invoked its authority to constrain the choices of state legislatures and regulate the methods of electing members to the House of Representatives. *See, e.g.*, Act of Feb. 2, 1872, 17 Stat. 28, 28 (requiring election by contiguous, single-member districts of equal population); Act of Feb. 25, 1882, 22 Stat. 5, 5 (same); Act of Feb. 7, 1891, 26 Stat. 735, 736 (same); Act of Jan. 16, 1901, 31 Stat. 733, 734 (requiring election by compact, contiguous, single-member districts of equal population); Act of Aug. 8, 1911, 37 Stat. 13, 14 (same).

Congress's authority over congressional redistricting is vast. Currently, Congress directs that members of Congress be chosen by district and that no district may elect more than a single member. 2 U.S.C. § 2c. There is no dispute that Congress *could* reinstate the requirement of "compact" districts or that Congress could prohibit States from considering party registration data in drawing districts. *See* Br. of *Amici* Members of Congress 5 ("It is true . . . that Congress has the power to limit partisan gerrymandering in congressional elections."). In fact, "[t]here can be no dispute that Congress itself may draw a State's congressional-district boundaries." *Ariz. State Legislature*, 135 S. Ct. at 2670. But there is no constitutional basis for this Court to assume Congress's electoral powers out of concern that Congress has abdicated its responsibilities.

Even as this Court has expanded its oversight of some aspects of redistricting, it has continued to recognize the democratic value of congressional primacy in this area. "That Congress is the federal body explicitly given constitutional power over elections is . . . a noteworthy statement of preference for the democratic process." *League of United Latin Am. Citizens*

v. *Perry*, 548 U.S. 399, 416 (2006) (*LULAC*). Thus, "a lawful, legislatively enacted plan should be preferable to one drawn by the courts." *Id.*

Recognizing that the Constitution assigns the judiciary no place in restraining partisan redistricting would not undermine the Court's oversight of other aspects of redistricting. In particular, this Court's racial gerrymandering jurisprudence rests on a unique constitutional, statutory, and historical footing. *See, e.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184, 191–92 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States."); *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995) (same). This Court's racial gerrymandering cases are intended to eliminate invidious discrimination based on immutable characteristics and are supported by provisions of the Constitution, *see* U.S. Const. amends. XIV, XV, and congressional enactments, *see* Voting Rights Act of 1965, 79 Stat. 437; 52 U.S.C. § 10301, specifically prohibiting that illicit conduct. No comparable constitutional or statutory directive empowers federal courts to override Congress and the state legislatures in order to superintend partisanship in redistricting.

In light of the Framers' decision to empower Congress and the state legislatures to regulate congressional redistricting, and the absence of any comparable constitutional text authorizing judicial involvement in the process, the Court should hold that partisan redistricting does not present a justiciable question.

B. There Is No Manageable Standard For First Amendment Gerrymandering Claims.

Appellants' claims are also nonjusticiable for a second reason. Under the political question doctrine, courts have no role to play when the asserted claim "lacks sufficient precision to afford any judicially manageable standard of review." *Nixon*, 506 U.S. at 230. This limit is jurisdictional; when there is no standard to apply, the case must be dismissed. *See Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974).

Courts have been asked to consider partisan gerrymandering claims for decades under a variety of constitutional theories, including claims resting on First Amendment rights. But no court, under any constitutional theory, has devised a standard that consistently and manageably resolves partisan gerrymandering claims. Appellants' First Amendment theory is no different. Because Appellants have not proposed a judicially manageable standard, their claim asserts a nonjusticiable question.

1. This Court Has Never Articulated An Administrable Standard For Political Gerrymandering Claims.

This Court has struggled with partisan gerrymandering claims for more than fifty years. The early decisions of this Court did not squarely confront the question of justiciability, but the outcomes of those cases pointed in both directions. *Compare WMCA, Inc.* v. *Lomenzo*, 382 U.S. 4 (1965), *summarily aff'g* 238 F. Supp. 916 (S.D.N.Y. 1965) (political redistricting claim is not justiciable); *Jimenez* v. *Hidalgo Cty. Water Improvement Dist. No. 2*, 424 U.S. 950 (1976), *summarily aff'g* 68 F.R.D. 668 (S.D. Tex. 1975) (same);

Ferrell v. *Hall*, 406 U.S. 939 (1972), *summarily aff'g* 339 F. Supp. 73 (W.D. Okla. 1972) (same); *Wells* v. *Rockefeller*, 398 U.S. 901 (1970), *summarily aff'g* 311 F. Supp. 48 (S.D.N.Y. 1970) (same), *with Gaffney* v. *Cummings*, 412 U.S. 735, 751 (1973) (adjudicating claim of political apportionment without assessing justiciability); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965) (plans that "cancel out the voting strength of . . . political elements of the voting population" are invalid); *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson*); *Whitcomb* v. *Chavis*, 403 U.S. 124, 143 (1971) (same).

When this Court first considered the question in depth, the outcome was a fractured result. *Bandemer*, 478 U.S. 109. A plurality of four Justices argued that partisan gerrymandering claims were cognizable under the Constitution and that plaintiffs were "required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127 (plurality op.). The plurality insisted that plaintiffs did not suffer an injury from "the mere lack of proportional representation" but were entitled to relief if the district map "consistently degrade[d] a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. But the plurality could not describe with any specificity when a voter's influence was sufficiently "degraded."

Justice Powell, joined by Justice Stevens, agreed that partisan gerrymandering claims were justiciable but proposed a completely different standard for evaluating them. In his view, "the . . . most basic flaw in the plurality's opinion [was] its failure to enunciate any standard that affords guidance to legislatures and

courts." *Bandemer*, 478 U.S. at 171 (Powell, J., concurring in part and dissenting in part). His alternative standard considered "a number of other relevant neutral factors," including "the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of districting"—in short, traditional redistricting criteria. *Id.* at 162, 165 (Powell, J., concurring in part and dissenting in part).

The remaining three Justices rejected this endeavor entirely, concluding that "the partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended." *Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring in the judgment). These Justices recognized that the plurality had produced, at best, a "nebulous standard" that merely demonstrated the "intractable difficulties in deriving a judicially manageable standard" for partisan gerrymandering claims. *Id.* at 155.

Bandemer suggested lower courts should hear partisan gerrymandering claims but gave scant guidance as to how. The legacy of the Court's four opinions was "one long record of puzzlement and consternation." *Vieth*, 541 U.S. at 282 (plurality op.). The root of the problem was that redistricting demands judgments that are "largely subjective and beg questions that lie at the heart of political competition in a democracy." Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1365 (1987). Courts are ill-suited to answer these questions.

The Court recognized that it could not leave the lower courts struggling with the "recondite standard"

enunciated in *Bandemer*, which "offer[ed] little concrete guidance," *Vieth* v. *Pennsylvania*, 188 F. Supp. 2d 532, 544 (M.D. Pa. 2002), and it decided to take up the question of partisan gerrymandering again in *Vieth* v. *Jubelirer*, 539 U.S. 957 (2003) (noting probable jurisdiction).

After surveying the disarray sown by the *Bandemer* decision, a majority of the Court agreed that litigating partisan gerrymandering claims was proving unworkable. A plurality concluded that "political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided." *Vieth*, 541 U.S. at 281 (plurality op.). Justice Kennedy was not ready to "foreclose all possibility of judicial relief," but concluded that "the failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper." *Id.* at 306, 317 (Kennedy, J., concurring in the judgment). Four dissenting Justices offered three separate opinions, each proposing a standard different from one another and from the test proposed by the *Bandemer* plurality.

Although the lower court in *Vieth* had principally analyzed the plaintiffs' partisan gerrymandering claims under an equal-protection theory, the complaint also alleged a violation of the First Amendment. 541 U.S. at 314 (Kennedy, J., concurring in the judgment). Justice Kennedy suggested that "the First Amendment may offer a sounder and more prudential basis for judicial intervention in political gerrymandering cases," but also recognized that a First Amendment theory faced the same fundamental problem thwarting effective application of a Fourteenth Amendment theory: the necessity for "a manageable

standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters." *Id.* at 315 (Kennedy, J., concurring in the judgment).

Merely two years after *Vieth*, the Court considered whether another set of plaintiffs had "offer[ed] the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution." *LULAC*, 548 U.S. at 414. The *LULAC* plaintiffs argued that the challenged map's use of "politics in drawing lines of specific districts violate[d] the First Amendment" as well as various other constitutional provisions. *Id.* at 409. But the Court in *LULAC* reached the same conclusion as it had in *Vieth*: A judicially manageable standard remained elusive. *Id.* at 423.

Bandemer, *Vieth*, and *LULAC* have left courts struggling to apply a jurisprudence that is "foggy at best" consisting of "cobbled-together plurality opinions that place district courts in the untenable position of evaluating political gerrymandering claims without any definitive standards." *Radogno I*, 2011 WL 5025251, at *4. The only predictable outcome has been chaos. *See Shapiro* v. *McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016) ("while political gerrymandering claims premised on the Equal Protection Clause remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge"); *Raleigh Wake Citizens Ass'n* v. *Wake Cty. Bd. of Elections*, 166 F. Supp. 3d 553, 591 n.15 (E.D.N.C.) (observing the "extraordinary tension" among this Court's partisan gerrymandering decisions), *aff'd in part*, 827 F.3d 333, 348 (4th Cir. 2016)

("the Supreme Court has not yet clarified when exactly partisan considerations cross the line from legitimate to unlawful"); *Ala. Legislative Black Caucus* v. *Alabama*, 988 F. Supp. 2d 1285, 1296 (M.D. Ala. 2013) (*ALBC I*) ("the standard of adjudication for [plaintiffs'] claim of partisan gerrymandering is 'unknowable'"); *Radogno* v. *Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 WL 5868225, at *2 (N.D. Ill. Nov. 22, 2011) (*Radogno II*) ("political gerrymandering claims . . . are currently 'unsolvable' based on the absence of any workable standard for addressing them"); *Perez* v. *Texas*, No. 11-CA-360, 2011 WL 9160142, at *11 (W.D. Tex. Sept. 2, 2011) (dismissing political gerrymandering claims due to the absence of "a reliable standard by which to measure the redistricting plan's alleged burden on . . . representational rights"); *Agre* v. *Wolf*, No. 17-cv-4392, 2018 WL 351603, at *23 (E.D. Pa. Jan. 10, 2018) ("No precise test has been agreed upon.").

Even after the explicit invitation offered by Justice Kennedy's concurrence in *Vieth*, the lower courts have been unable to fashion First Amendment theories into a useful constitutional standard for adjudicating partisan gerrymandering claims. This checkered history—littered with discarded theories that failed to provide a manageable judicial standard for deciding these claims—shows that there is simply no means by which a federal court can effectively evaluate whether a redistricting plan is unduly partisan.

2. Neither The Lower Court Nor The Appellants Offer An Administrable Standard.

Appellants argue that their framework, grounded in the First Amendment, presents a novel theory capable of untangling the Gordian knot of partisan ger-

rymandering. But there is nothing novel about approaching gerrymandering using a First Amendment lens. The *Vieth* plaintiffs asserted a First Amendment claim, arguing that the map violated their right to free association. *Vieth* v. *Pennsylvania*, No. 01-cv-2439, ECF no. 6 (M.D. Pa. Jan. 11, 2002). A number of other redistricting challenges, including many of those catalogued above, have brought partisan gerrymandering claims grounded in the First Amendment. *See supra* note 2. But these claims have proved no more administrable than similar claims sounding in equal protection. *See supra* note 2; *see also* J.S. App. 16a (noting "uncertainty in the law").

Neither Appellants nor the district court has proposed an administrable standard based in First Amendment principles or otherwise.

a. The district court proposed a three-part test requiring plaintiffs alleging a First Amendment-based partisan gerrymandering claim to prove specific intent, demonstrable vote dilution, and a causal connection between the vote dilution and the mapmakers' discriminatory intent. J.S. App. 3a–4a. But neither the alleged vote dilution nor the purported cause-and-effect relationship can be accurately measured by a court.

The divided results at each stage of the lower-court proceeding underscore the impossibility of administering this test. While Judges Russell and Niemeyer held, at the pleading stage, that a First Amendment claim was justiciable, their agreement as to the claim's contours broke down in application. At the preliminary-injunction stage, Judge Russell joined Judge Bredar in holding that Appellants failed to show "that it was the gerrymander (versus a host of forces present in every election) that flipped the Sixth

District and, more importantly, will continue to control the electoral outcomes in that district." J.S. App. 17a.

Judge Niemeyer, ostensibly applying the same test, did not require Appellants to prove that their electoral losses were caused by the gerrymander, but instead required only that they show that "absent the State's retaliatory intent, the Sixth District lines would not have been drawn to dilute the electoral power of Republican voters to the same extent." J.S. App. 72a. His circuitous reasoning blends causation with intent, presuming causation whenever a plaintiff can show discriminatory or "retaliatory" intent. Despite reciting the number of registered voters moved from one district to another, the dissenting opinion makes no mention of how voters actually cast their votes.

Judge Niemeyer's standard, which would find a First Amendment violation whenever there is a shift in partisan voting patterns, sees impermissible partisan manipulation in every change in margins. This hypersensitivity overlooks the numerous factors that influence voting patterns—candidate strength, fundraising, shifts in the national mood, or the self-sorting of voters moving in and out of districts. While the dissent attributes all changes (automatically labeled "vote dilution") to gerrymandering, the Cook Political Report on which the dissent relies, J.S. App. 52a, concludes that diminished competitiveness in House races is overwhelmingly attributable to geographic self-sorting by voters, not to gerrymandering. *See* David Wasserman & Ally Flinn, *Introducing the 2017 Cook Political Report Partisan Voter Index*, The Cook Political Report (Apr. 7, 2017) ("Of the 92 'Swing Seats' that have vanished since 1997, 83 percent of the

decline has resulted from natural geographic sorting of the electorate from election to election, while only 17 percent of the decline has resulted from changes to district boundaries."), https://www.cookpolitical.com/index.php/introducing-2017-cook-political-report-partisan-voter-index.

Indeed, the results in the Sixth District itself demonstrate the mutability of electoral choices and the challenge confronting those who would seek to measure the alleged dilution or suppression of partisan interests. In 2012, the first election following the redistricting, Democrat John Delaney defeated the incumbent Republican by a margin of 20.9%. J.S. App. 20a. Two years later, he scraped by to reelection with only a 1.5% margin of victory even though his Republican opponent did not even live in the Sixth District. J.S. App. 20a, 21a. In that same election, the Sixth District supported Republican gubernatorial candidate Larry Hogan with 56% of the vote and a 14-point margin. J.S. App. 21a. In 2016, Delaney's margin improved to 14.4%. J.S. App. 20a. This variability is due entirely to normal political factors—none of the Sixth District's boundaries changed between these elections, yet the outcome varied by nearly twenty points. The only surprising detail is that the Sixth District became more competitive while most districts are becoming less competitive. *See* Wasserman & Flinn, *supra* ("[I]n the 2016 election, 78 percent of Democratic-leaning seats grew even more Democratic and 65 percent of Republican-leaning seats grew even more Republican.").

With this much electoral noise, it is nearly impossible for political scientists, much less generalist judges, to isolate the signal of partisan redistricting. As a result, the lower court concluded that Appellants

had not shown that these elections were determined by gerrymandering rather than by "subjective factors such as evolving political temperament and the personal strengths or weaknesses of individual candidates." J.S. App. 27a.

b. Appellants' efforts to prove that the lower court misapplied their proposed First Amendment standard merely expose the unworkability of that standard. Among other serious flaws, Appellants are unable to propose a metric for assessing the partisan effect of an alleged gerrymander.

First, Appellants, like the dissent below, rely almost exclusively on voter registration data and the change in the proportion of registered Democrats to Republicans. Appellants were forced to rely on registration data because they "conducted no statistical sampling and have adduced no individual voter data showing how displaced and current residents of the Sixth District *actually voted* in 2012, 2014, and 2016." J.S. App. 20a (emphasis added). But registration data is an unreliable metric. Registration does not reveal whether a voter actually casts a ballot, much less for whom the hypothetical ballot is cast. To the contrary, "while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in the judgment).

Between 2012 and 2016, the boundaries of the Sixth District remained unchanged, and the proportion of registered voters by party remained relatively constant as a result, but the outcomes in actual elections varied widely depending on the candidate and the conditions. Congressman Delaney, the Democrat first elected in 2012, prevailed by 20.9%, 1.5%, and

14.4% in 2012, 2014, and 2016, respectively. J.S. App. 20a. Those changes cannot be accounted for merely through shifting voter registration patterns, which did not fluctuate to nearly the same extent. *See* Md. State Bd. of Elections, Voter Registration Statistics (showing a 1.4:1 registration ratio of Democrats to Republicans in the Sixth District in 2016 and a 1.36:1 ratio in 2014), http://www.elections.state.md.us/voter_registration/stats.html. Nor can voter registration data account for the differing success of candidates of the same party in the same year. In the same election in which Congressman Delaney prevailed by a margin of nearly 21%, his Senate counterpart, the incumbent Democrat Ben Cardin, achieved only 50% of the vote in the Sixth District while winning 56% statewide. J.S. App. 20a. And in 2014, when Congressman Delaney prevailed by a 1.45% margin, the Sixth District supported gubernatorial candidate Republican Larry Hogan by a 14-point margin. J.S. App. 20a–21a. Unfortunately for Appellants, these are facts beyond dispute.

Second, Appellants' statistical arguments are undermined by the absence of a reliable baseline for comparison. Unlike the tests typically proposed by gerrymandering plaintiffs under the Equal Protection Clause—whether the efficiency gap, partisan symmetry, or statewide proportionality—the metrics proposed by Appellants here are useless when looking at a single election. Appellants rely on making comparisons across time, looking at outcomes in one election as compared with another two years before or after. This makes it impossible to control for the multiplicity of factors that can affect changes in voter behavior over time.

Furthermore, the absence of a reliable baseline forces Appellants to presume that the prior map represented a constitutional idyll and that any dilution from that previous balance violates the Constitution. Indeed, Appellants' entire argument is that the legislature unconstitutionally retaliated against them by reducing the number of registered Republicans in the Sixth District, diluting Appellants' votes and resulting in an electoral defeat. But Appellants do not even attempt to demonstrate that the old lines of the Sixth District were constitutionally permissible.

A pair of hypotheticals demonstrates the unfounded assumption underlying Appellants' test. If a State had a congressional map that was a bipartisan gerrymander, drawn to provide safe seats to Democrats and Republicans, and redistricted to create competitive districts, under Appellants' test, voters in both parties could show that their First Amendment rights were violated because they were deliberately deprived of their safe seats. But there is plainly no constitutional right to a bipartisan gerrymander. Similarly, consider a State with a severely gerrymandered district map that experienced a change in partisan control. If the new majority party drew non-partisan maps, the former majority party would suffer precisely the same statistically-based injury and precisely the same vote dilution on which Appellants rely. Appellants' metrics thus fail to provide meaningful guidance to courts.

In light of the challenge of disaggregating the effect of gerrymandering from other political factors, Appellants even suggest that district courts should survey enormous numbers of, or perhaps all, voters in the District. Opp. Mot. Affirm at 11. In effect, Appellants would have district courts conduct a second

statewide election (based on purely hypothetical district lines) after each actual election. Such an undertaking is neither an appropriate judicial function nor required by the First Amendment. Indeed, Appellants themselves did not even attempt such a burdensome task.

Without a reliable baseline, Appellants are left asking how an election would have unfolded had the candidates run not in the current district but within the old district lines. But, without even a poll of voting behavior in the old iteration of the district, Appellants can rely on nothing more than speculation. This reliance is fatal: "Even assuming a court could choose reliably among different models of shifting voter preferences, [this Court is] wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *LULAC*, 548 U.S. at 420 (Kennedy, J., concurring).

What Justice Kennedy said in *Vieth* remains true today:

> When presented with a claim of injury from partisan gerrymandering, courts confront two obstacles. First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting seems to command general assent. Second is the absence of rules to limit and confine judicial intervention. With uncertain limits, intervening courts—even when proceeding with the best intentions—would risk assuming political, not legal responsibility for a process that often produces ill will and distrust.

Vieth, 541 U.S. at 306–07 (Kennedy, J., concurring in the judgment).

Plaintiffs' First Amendment standard is insufficient to surmount either of those obstacles.

C. Repeated Redistricting Litigation Damages The Political Process And The Courts.

Judicial refereeing of partisanship in the redistricting process—whether under the First or Fourteenth Amendment—destabilizes the political branches and our political system. An opinion of this Court setting judicially imposed limits on partisan considerations would diminish electoral accountability and increase legislative gridlock as shifting coalitions transition in and out of power. *See Vieth*, 541 U.S. at 357–58 (Breyer, J., dissenting). It would also increase exponentially the already-significant burden that these cases impose on the judiciary.

There are no countervailing benefits that would provide a reason to tolerate these untoward outcomes. Voters already have the ability to use the political process to restrain partisan apportionment. *Vieth*, 541 U.S. at 362–63 (Breyer, J., dissenting). No matter the role of partisan considerations in redistricting, voters still have the final say about which candidate will prevail. For example, five days after one district court ruled in favor of Republicans in a case challenging partisan gerrymandering in judicial elections, every single Republican candidate prevailed under the prior, invalidated electoral system. *See id.* at 287 n.8 (plurality op.) (discussing election results). More recently, in a special election for the Wisconsin Senate, the Democrat candidate decisively won a seat that had been vacated by a Republican, in a district that

Republicans carried in the last two presidential elections. *See* Patrick Marley, *Democrats Grab Key Wisconsin Senate Seat in Tuesday's Special Elections*, *Milwaukee Journal Sentinel* (last updated Jan. 17, 2018), https://www.jsonline.com/story/news/2018/01/16/wisconsin-voters-chose-legislators-tuesdays-special-elections/1038687001. The Wisconsin Senate map, of course, was invalidated as an unconstitutional partisan gerrymander by the district court in *Gill* v. *Whitford*, No. 16-1161.

As a practical matter, an overly partisan map risks spreading the dominant party's voters too thinly, leading to the loss of seats. And those losses may be exacerbated by the perception of undue partisanship, which may provoke an electoral backlash. *See* Jacob Eisler, *Partisan Gerrymandering and the Illusion of Unfairness*, 67 Cath. U.L. Rev. (forthcoming 2018) (arguing that "political adaptation" by voters and parties "undermines the case for litigating partisan gerrymandering"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993876. Thus, recent history provides many examples where the party that attempted to entrench itself through a partisan gerrymander was voted out of office in short order. *See, e.g.*, *Ala. Legislative Black Caucus* v. *Alabama*, 231 F. Supp. 3d 1026, 1037 (M.D. Ala. 2017) (*ALBC II*) ("The 2001 partisan gerrymander [by Democrats] failed to save the Democrats in 2010, when Republicans won supermajorities in both houses.").

Nor is voting out incumbents the only option available to citizens. They can limit the legislature's role in drawing legislative districts. *See Ariz. State Legislature*, 135 S. Ct. at 2663 (upholding a redistricting commission adopted through the initiative pro-

cess); Cal. Const. art. XXI, §§ 1–3 (establishing a redistricting commission); Alaska Const. art. VI, § 8 (same); Wash. Const. art. II, § 43 (same); Idaho Code Ann. §§ 72-1501 *et seq.* (same). And they can pass state laws and state constitutional provisions regulating partisan redistricting. *See, e.g.*, *League of Women Voters of Pa.* v. *Commonwealth*, 175 A.3d 282 (mem.) (Pa. 2018) (interpreting a state constitutional provision to regulate partisan gerrymandering), *stay denied sub nom. Turzai* v. *League of Women Voters of Pa.*, No. 17A795 (U.S.) (Alito, J.), *opinion issued sub nom. League of Women Voters of Pa.* v. *Pennsylvania*, No. 159 MM 2017, 2018 WL 750872 (Pa. Feb. 7, 2018); *League of Women Voters of Fla.* v. *Detzner*, 172 So. 3d 363, 369–70 (Fla. 2015) (applying a "Fair Districts Amendment" to a state constitution that expressly prohibited redistricting for partisan advantage).

At the federal level, as discussed above, Congress also has the authority to police apportionment of congressional districts under the Elections Clause. U.S. Const. art. I, § 4. Congress has exercised that authority to require single-member districts. 2 U.S.C. § 2c. And there are no fewer than ten bills currently pending in Congress that propose to regulate apportionment. S. 1880, H.R. 3537, H.R. 3848, H.R. 3057, H.R. 1102, H.R. 713, H.R. 712, H.R. 711, H.R. 151, H.R. 145, 115th Cong., 1st Sess. (2017).

The availability of these non-judicial remedies for partisan gerrymandering means there is very little reason for courts to shoulder the serious burdens that political apportionment challenges impose on judicial resources. It is a task that never ends. Redistricting litigation returns "[l]ike a periodic comet, once every ten years," *Radogno I*, 2011 WL 5025251, at *1, and increasingly in the middle of a cycle, as this appeal

and *Gill* illustrate. Nor is litigation limited to only a handful of States—apportionment lawsuits are filed across the nation. Because these lawsuits are heard by three-judge district courts and require exhaustive judicial fact-finding, they impose unusually high demands on judges. *See, e.g.*, *ALBC II*, 231 F. Supp. 3d 1026 (378-page opinion); *Whitford* v. *Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (128-page opinion), *jurisdiction postponed*, No. 16-1161 (2017). Redistricting challenges typically drag on for years, often reaching resolution only as the next Census approaches. *See, e.g.*, *Benisek* v. *Lamone*, No. 1:13-cv-3233, ECF no. 1 (D. Md.) (complaint filed over four years ago); *Abbott* v. *Perez*, No. 17-586, 2018 WL 386558 (U.S. Jan. 12, 2018) (postponing jurisdiction and scheduling for argument more than six years after complaint); *Ala. Legislative Black Caucus* v. *Alabama*, No. 2:12-cv-691, ECF no. 374 (M.D. Ala. Oct. 23, 2017) (final judgment after more than five years).

It also is a task of endless scope. As Justice O'Connor observed, "[i]f members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims." *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment). "Federal courts will have no alternative," she continued, "but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups." *Id.* Far from mitigating this danger, Appellants embrace it; they concede that, to resolve their claims, it might "become[ ]

necessary" to survey a potentially large number of residents of the Sixth District and analyze the results, Opp. Mot. Affirm 11—an onerous task by any measure.

The Court has given plaintiffs and lower courts more than a decade since *Vieth* to develop a workable standard for partisan gerrymandering cases. They have failed to do so, and it is time for the Court to give clear guidance by holding that these cases are nonjusticiable. To do otherwise would continue to place district courts in "litigation limbo," condemning them to "many more years wrestling with [these cases] all without a wisp of an idea what rule of law might govern [their] disposition." *Kerr* v. *Hickenlooper*, 759 F.3d 1186, 1195 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of rehearing en banc). Recognizing that these questions are nonjusticiable would acknowledge the reality of redistricting and relieve the courts and the political branches of the intolerable uncertainty sown by prior redistricting decisions.

CONCLUSION

The Court should vacate the judgment and direct the district court to dismiss the complaint because political gerrymandering does not implicate the First Amendment and political gerrymandering claims are nonjusticiable.

Respectfully submitted.

DOUGLAS R. COX
Counsel of Record
AMIR C. TAYRANI
DAVID W. CASAZZA
BRIAN M. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
dcox@gibsondunn.com

Counsel for Amicus Curiae

February 28, 2018